Filed 2/11/2009

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>HELIODORO ROMERO-ARELLANO et al.,<br>Defendants and Appellants. | A119908<br><br>(Sonoma County<br>Super. Ct. No. SCR-516132) |

For more than 140 years, California jury instructions have referred to the prosecuting authority as "the People." CALJIC used that reference in its instructions, which reference continues today in CALCRIM. Instructed here with CALCRIM instructions, a jury convicted defendants Heliodoro Romero-Arellano and Misael Jimenez-Gutierrez (when referred to collectively, defendants) with possession of methamphetamine for sale (Health & Saf. Code, § 11378) and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). Jiminez-Gutierrez was also convicted of evading a police officer (Veh. Code, § 2800.2, subd. (a)).

Both defendants appeal, and each has filed his own brief, also joining in the argument of the other. (See Cal. Rules of Court, rule 8.200(a)(5); *People v. Stone* (1981) 117 Cal.App.3d 15, 19.) The result is that defendants jointly make two arguments: (1) the trial court abused its discretion in excluding cross-examination of Officer Tomlin about his testimony in another case; and (2) the jury instructions referring to "the People" violated due process. We conclude that neither argument has merit, and we affirm. The

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I.A & B.

unpublished portion of the opinion explains the reasons for rejecting the first argument. We publish the reasons for rejecting the second.

## BACKGROUND

### The Facts

Neither argument involves the facts giving rise to the convictions, and those facts need not be set forth in detail. The essential facts are that on July 18, 2007, Santa Rosa Police Detective Matthew Tomlin was working as an undercover narcotics officer, dressed in plain clothes and in an unmarked vehicle. Tomlin was parked in a Taco Bell parking lot on Townview Lane, an area that "frequently has a lot of narcotic activity"; he was looking for suspicious vehicles, that is, vehicles that would slowly cruise around.

Tomlin saw a gold Saturn approach and initially park along the sidewalk. Two men were in the Saturn, identified by Tomlin at trial as Jimenez-Gutierrez, the driver, and Romero-Arellano, the passenger. Neither man got out of the car. A short time later the Saturn began to drive "slowly," occasionally stopping, making two or three circles around the area. Tomlin began to follow the Saturn. He also called Officer Patrick Gillette, who was in uniform in a marked police vehicle, and requested that he become involved and, were he to observe a traffic violation, effect a traffic stop.

Gillette drove to the Townview area, located the Saturn, and after a time saw it cross over the limit line into a bicycle lane and also change lanes without signaling. Gillette signaled for the Saturn to pull over, which it did. Gillette got out of his patrol car and began to approach the Saturn; as he reached the right rear quarter panel, the Saturn suddenly sped off. Gillette ran back to his patrol car and began pursuit of the Saturn, with the emergency lights and siren on. The chase reached speeds of 60 to 70 miles per hour, with the Saturn running red lights and crossing over a double yellow line, forcing other drivers to take evasive action. The Saturn was "all over the road."

The pursuit continued along Bennett Valley Road, a winding road, and along the way Gillette saw the passenger throw "at least two" objects out of the window. They "looked like something wrapped in clear plastic of a white-ish type color," and Gillette suspected they contained narcotics. Gillette radioed other officers what he saw, and

continued his pursuit for another half-mile, when the Saturn abruptly pulled over to the side of the road. Gillette waited for backup officers to arrive, at which point he ordered the occupants out of the Saturn, one at a time. The first out was Jimenez-Gutierrez, the driver, followed by Romero-Arellano.

Tomlin had seen the Saturn initially pull over when Gillette activated his emergency lights, and also saw it speed away as Gillette approached. Tomlin joined in the pursuit (though not at high speed), and ultimately pulled up alongside Gillette's patrol car when the Saturn finally stopped. Tomlin later searched the Saturn at the scene, and found $910 in the glove compartment.

Meanwhile, Gillette returned to the spot where he saw the objects thrown from the Saturn, and "immediately" located three plastic bags containing a crystal-like white powder some 10 to 15 feet from the road. The bags were free of debris or dirt and were not damp from condensation. Gillette later turned the items over to Tomlin.

Undercover Detective Jessie Cude had heard the radio report about the items thrown from the Saturn, and from the point where the Saturn stopped he walked backwards along Bennett Valley Road. About a quarter-mile back, Cude found on the side of the road a digital scale and five empty plastic sandwich bags rolled up in a ball.

At the police station Tomlin and Cude weighed the three packages at 29.7 grams, 6.5 grams, and 4.6 grams, for a combined weight of 40.8 grams, approximately an ounce and a third. Chemical analysis of two of the bags showed they contained methamphetamine; the third bag was never tested. Qualified as an expert witness, Tomlin gave the opinion that the methamphetamine was possessed for sale, an opinion based on the quantity of methamphetamine, the amount of cash in the Saturn, the scale and drug packaging apparently thrown from the Saturn, and other factors.

**The Trial**

The above facts were presented to the jury over three days, October 18, 22, and 23, 2007. The prosecution gave its closing argument on the morning of October 26. The court then gave its brief concluding instructions and placed the matter in the hands of the

jury. This was at 9:45 a.m. At 10:32 a.m. the jury requested two exhibits, which the court agreed to provide. By 11:41 a.m. the jury had reached its verdicts.

## ANALYSIS

### I. The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Impeach Officer Tomlin

#### A. The Proceedings Below

##### 1. The Motion in Limine

Romero-Arellano filed a motion in limine (Number 16) seeking to "introduce collateral evidence of Officer Tomlin's prior untruthful testimony," specifically, evidence from *People v. Whiteman,* Super. Ct. Sonoma County, 2005, No. SCR-442438, a Sonoma County domestic violence case (the Whiteman case).[1] The motion was supported by a declaration of a deputy public defender, and included four exhibits: portions of the transcript of the cross-examination of Tomlin in the Whiteman case; a copy of the incident report leading to the case; a tape recording of the dispatch conversation between Whiteman and the police department; and a transcript of that dispatch.

The claimed "untruthful testimony" from the Whiteman case was Tomlin's version of events as related at trial, consistent with his incident report, the essence of which was this: as Tomlin approached the motel parking lot he saw Whiteman with his "arms raised" and "yelling." And, the motion essentially asserted, Tomlin's report and his trial testimony were untruthful in light of the dispatch tape.

More specifically, the motion pointed to Tomlin's incident report, which said that as he pulled in to the motel parking lot, he "saw a white male [Whiteman] in the middle of the parking lot yelling out loud." At Whiteman's trial, Tomlin testified it was "absolutely true" that Whiteman was "in the middle of the parking lot with his arms out to the side shouting," essentially confirming his report. According to the motion, Whiteman's call to the police department contradicted this, reflecting that Whiteman was on the telephone when a police officer pulled up. Thus, the motion sought to introduce what it acknowledged was "collateral evidence."

[1] Jimenez-Gutierrez later joined in the motion.

The trial court had obtained all 57 pages of the cross-examination of Tomlin in the Whiteman case, which was later introduced as Court Exhibit 1.[2] That transcript revealed that Tomlin was questioned as to why he believed Whiteman was yelling, and he responded that, from approximately 40 yards away, he observed Whiteman with "[b]oth arms up to the side. I don't recall if they were up high or low. I remember the arms being out. It appeared like somebody shouting, like a football coach on the sideline shouting." Tomlin was confronted about this, and the following ensued:

"Q. It is not true, is it Officer, that when you drove up to the scene, Mr. Whiteman was not out in the middle of the parking lot with his arms out yelling to (the victim)?

"A. That's absolutely true that he was in the middle of the parking lot with his arms out to the side shouting upstairs.

"Q. Absolutely true that he was in the middle of the parking lot with his arms out shouting upstairs. Is that your testimony, Officer?

"A. Absolutely true.

"Q. Absolutely true?

"A. Absolutely true."

Tomlin was then questioned whether he saw Whiteman with a cell phone or was aware that Whiteman was calling the Santa Rosa Police Department. Tomlin replied that he did not recall a cell phone or any phone conversation taking place, and continued to state he did not know if Whiteman called the department and that he was not doing it in front of him.

At this point the court in the Whiteman case conducted a 402 hearing. During the hearing the defense played a police dispatch tape which recorded Whiteman's call to the department, at the very end of which Whiteman states that he sees an officer approaching. The tape records someone say, "what's up man," and Whiteman responds, "Hi." Whiteman is then asked if he is "Randy?" and he identifies himself as Randy Whiteman. Whiteman then confirms for dispatch that he is with an officer, and the call ends.

[2] The record does not indicate how all of the 57 pages came to be before the trial court.

Tomlin was questioned during the 402 hearing and stated that he could not identify the voice as either his or that of Officer Matt Clark. Tomlin did agree that Whiteman must have made a phone call, but confirms that he did not see a phone. And after hearing the call, Tomlin concedes that Whiteman must have been on the phone with police when he pulled up. The court in the Whiteman case ultimately allowed the tape to be played to the jury.[3] After it was played, Tomlin was again confronted with his testimony about his initial observations when he arrived at the motel. He again confirmed his version of events, a confirmation that included this:

"Q. Your testimony has now changed from 'absolutely;' isn't that correct?

"A. It hasn't changed. That's what I said earlier when you asked me before the break. The windows were up in my car when I pulled in. I do not know what he was saying.

"Q. And, Officer, you know full well, when you put that description of a white male standing in the middle of the parking lot yelling out loud to (the victim), that that was not what had occurred; isn't that correct?

"A. Not at all. It's totally incorrect."

The People filed their own motion in limine, which was essentially the converse of defendant's Motion No. 16, and the court had put its decision over to October 4, 2007.

**2. <u>The Ruling on the Motion</u>**

On October 4, before the hearing on the motion, the court heard testimony from Whiteman's mother Jackie, who was put on the stand by Romero-Arellano in a further effort to contradict Tomlin's testimony at the Whiteman trial. According to his mother, Whiteman did not yell or waive his arms; he was upset but calm, she said, and talking on his cell phone when the police arrived.

[3] The court explained its ruling this way: "Nonetheless, this is a tape that is contemporaneous with his recollection of events and his testimony is his testimony. Why would you preclude the jury from hearing that tape? There could be a variety of explanations. There was another officer there. I don't know what the explanation will be, but basically, this is he wanted the tape to impeach the officer. Now, whether this succeeds in impeaching the officer ultimately is the question. But this may lend some doubt to the officer's recollection. And, in fairness, the jury should hear both sides of it."

Following Mrs. Whiteman's testimony, the court heard extensive argument on the motions, against the background that it had reviewed all pertinent materials, except that it had not had the opportunity to listen to the dispatch tape. After the argument, the court recessed, representing that it would review the new legal authority cited by Romero-Arellano at the hearing and would listen to the tape, which it did. In sum, the trial court could hardly have been more conscientious in what it reviewed prior to its ruling—or in the ruling itself. That ruling came the next day, October 5, 2007, and we quote it at length:

"THE COURT: Thank you. [¶]. . . [¶] . . . This case comes on for ruling today as to the possible impeachment information in regards to Officer Tomlin. And we're ready for that ruling. [¶]. . . [¶]

"Both defendants in this case, Mr. Romero-Arellano and Mr. Jimenez-Gutierrez, are asking this Court to allow the possible impeachment of a potential witness, and that being Officer Matt Tomlin from the Santa Rosa Police Department, based on a collateral and unrelated matter in which Officer Tomlin testified at a domestic violence jury trial in August of 2005.

"The defendants claim that the officer testified untruthfully at those proceedings, and therefore, this Court should allow inquiry in this trial in regard to that testimony, since it may go to the officer's character for honesty or veracity or their opposites or his attitude towards the action in which he testifies or towards giving of testimony, or the extent of his capacity to perceive, recollect, or communicate with any matter—in any matter about which he testified.

"This is all pursuant to Evidence Code Section 780.

"In making the Court's ruling in regards to allowing this testimony, as was raised in in limine motion number 16 by Ms. Thompson [attorney for Romero-Arellano] and joined by Ms. Knotts [attorney for Jimenez-Gutierrez], the Court has considered the moving points and authorities, and response by the defendant[s] and their response by the People.

"The Court also reviewed the transcript from the trial on August 30th, 2005. And in fact, that transcript has been marked as Court Exhibit number 1 and will be part of the record.

"The Court also has reviewed the tape that was received into evidence and provided by Ms. Thompson. And the Court should indicate that also on that tape, in addition to the phone call by Mr. Whiteman, there also was the phone call from Clearlake Police Department to Santa Rosa Police Department, and also, the phone call by Jane Doe to the Santa Rosa Police Department.

"So, the Court did review that.

"The Court, after reviewing the evidence in this case, makes no finding that Officer Tomlin deliberately lied in regards to the prior testimony at his [*sic*] trial. And in fact, Officer Tomlin was dispatched to the Astro Motel based on information that he received that the defendant, Mr. Whiteman, was responding from Clearlake to the Astro Motel that he had a gun and was going to shoot and kill . . . Jane Doe in this case.

"The Court in reviewing the transcripts from the testimony on August 30th, 2005, notes that at page 30, lines 2 through 3, that Officer Tomlin was told by the manager that the defendant was shouting, and that is in the record at that transcript.

"Also, on page 31, lines 18 through 19, Officer Tomlin made certain observations of Mr. Whiteman, and the fact that he was inside his car, still 40 yards away, with the windows rolled up. And further, at page 31, lines 13 through 14, he testifies and I'm quoting from the record, 'that it appeared to me that he was shouting out loud', although he did not know exactly what he was saying.

"The Court feels that it's reasonable to assume that Officer Tomlin in responding to a possible man with a gun case would be focused on other things, other than the overall conduct of the individual, and maybe looking for a weapon, and that again, his testimony was—is based on what Officer Tomlin perceived at the time.

"The Court did listen to Ms. Jackie Whiteman, who testified in this case. Ms. Whiteman is the mother of Mr. Whiteman. And the Court does need to consider any bias, interest, or motive she may have in testifying any particular way.

"Even with that, her testimony was not enough, I think, to convince the Court that Officer Tomlin deliberately lied in regards to his testimony, and that he was only testifying to his perceptions.

"Even Ms. Whiteman indicated she did not know what happened to the cell phone that was part of the testimony in this case.

"For those reasons, the Court, after reviewing the evidence, is going to—and I also want to put on the record Ms. Shaffer [the prosecutor] correctly pointed out that the CALCRIM instruction does indicate that two people can observe a particular incident and recall it in different ways. And I think that's exactly what happened in this particular case.

"Again, Officer Tomlin responded to a man with a gun call, a possible dangerous situation. He was 40 yards away. His focus may or may not have been directly on Mr. Whiteman. And it may be concerned for weapons. So, the Court does not, again, make a finding that he deliberately lied in those proceedings.

"Further, under 352, the Court feels that to allow inquiry into . . . Officer Tomlin's testimony in the Whiteman case on August 30th, 2005, would necessitate undue consumption of time and create a substantial danger of undue prejudice or confusing the issues are misleading the jury under 352.

"And basically, what we would have is a mini-trial within a trial. You would have to call for—the prosecution would have to call the motel manager. We would be calling Ms. Whiteman . . . . And we would be calling Mr. Whiteman. And we would be calling additional officers that may have been at the scene.

"For those reasons, the Court is going to go ahead and exercise its discretion under 352 and not allow the impeachment on what the Court feels is a collateral matter. And also, on a matter that it appears that there is no deliberate intent on the part of the officer to falsely present information to the Court back on August 30th, 2005.

"So, that is the Court's ruling. I'm going to deny your request to allow inquiry as to in limine motion number 16. I think the record has been presented."

### 3. Defendants' Additional Efforts Regarding Officer Tomlin

The issue was again addressed days later, on October 9, when this colloquy occurred:

"THE COURT: All right. [¶] . . . [¶] Any other issues, Ms. Thompson?

"MS. THOMPSON [counsel for Romero-Arellano]: The Court had asked if I had any comment regarding its ruling regarding Detective Tomlin's testimony in the Whiteman proceeding. . . . [¶]

"THE COURT: Sure.

"MS. THOMPSON: I understand the Court's made its ruling.

"I would ask, though, that our concern is that the report prepared by the detective indicates his observations, not any hearsay he may have heard from the hotel employee; that his testimony prior to the introduction of the dispatch or communication tape paints a very vivid picture of a man yelling, which corroborates the alleged victim's statements.

"The equivocation that arrived after the playing of the tape when the detective was given an opportunity to explain his testimony, I think, casts some doubt as to his ability to perceive the events and to his bias. And I don't believe given that the issue is limited to his report, and to his testimony, would actually involve an undue consumption of time or other witnesses, and we would otherwise just submit it.

"Thank you.

"THE COURT: All right. And did you want to respond, Ms. Shaffer?

"MS. SHAFFER [the Prosecutor]: Your Honor, I'll submit it on the Court's previously [*sic*] ruling. I think the Court has reviewed the records of this case and made its ruling at this point.

"THE COURT: Ms. Knotts, do you want to add anything?

"MS. KNOTTS [counsel for Jimenez-Gutierrez]: To that issue, no.

"THE COURT: All right.

"The Court just wants to reaffirm that under 352, we wind up redoing the Whiteman trial again. And the Court didn't find reading of the reports or transcripts any

deliberate, what is obviously deliberate attempts by the officer, but rather just some misconceptions of observation.

"So, under 352, the Court's going to continue to deny the request to allow impeachment based on the August 30th, 2005 proceedings."

Still, Romero-Arellano persisted, and on October 15, 2007 he moved for reconsideration of Motion in Limine No. 16, based on the claim that defendants had learned that Tomlin's testimony at the preliminary hearing in this case was "inaccurate[] and/or untruthful[]." Romero-Arellano argued, in the words of his counsel at the hearing, that this was a second incident of Tomlin "writing reports that don't necessarily reflect what actually happened and then testif[ies] consistent to his report." The trial court indicated that it would not preclude Romero-Arellano from cross-examining Tomlin about any claimed errors in the current case. However, again citing Evidence Code section 352, the court refused to allow the testimony from the Whiteman case—once again, in a most reasoned analysis:

". . . I will allow counsel to cross-examine Officer Tomlin as to his testimony at the preliminary hearing and in regards to who found it. And you are more than able to point out the discrepancy and argue those. So the Court is not going to disallow the introduction of this evidence because the Court does feel that both based on Officer Cude's report and Officer Tomlin's report, you had notice that the evidence was coming in at this trial. But I will allow wide latitude to cross-examine as to who found it, how it came into the possession of law enforcement.

"As to whether or not to allow the testimony from the Whiteman trial, the Court continues to exercise its discretion under 352 and not allow the testimony from the Whiteman trial. The Court feels it would be a trial within a trial. It would be undue time consumption. It would confuse the jury about the facts of this particular case.

"But again, I will allow counsel to cross-examine from the testimony from the preliminary hearing on August 3rd, 2007, and the discrepancies as to all three reports prepared in this case and all three officers."

**B. The Trial Court Acted Properly, in Full Accordance with the Law**

"In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal in the absence of an abuse of that discretion. [Citations.] This discretion is not, however, unlimited, especially when its exercise hampers the ability of the defense to present evidence. While the trial judge has broad discretion to control the ultimate scope of cross-examination, wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case." (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

But this latitude runs in the other direction as well, as the Supreme Court recently confirmed, in *People v. Harris* (2007) 43 Cal.4th 1269, 1291: " '[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.] (*People v. Ayala* (2000) 23 Cal.4th 225, 301; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)" As Justice Peters tersely put it long ago in *People v. Levergne* (1971) 4 Cal.3d 735, 744, a "party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted."

As the trial court aptly noted—indeed, as Romero-Arellano's motion expressly acknowledged—the testimony from the Whiteman case was a collateral matter. That perhaps ends the inquiry. But there is much more.

The trial court concluded that the evidence in the Whiteman case was not untruthful, not an intentional misrepresentation of events. It was "based on what Officer Tomlin perceived at the time." Or, as the court later put it, there were no "obviously deliberate attempts by the officer but rather just some misconceptions of observation." Defendants make no showing to the contrary, and instead argue that the dispatch tape is necessarily inconsistent with the caller's "waving hands." We are not persuaded, and need only observe that it is not uncommon for cell phone users to talk loudly—and

perhaps gesture with their hands. In short, the transcript was hardly as definitive as defendants would have it.

Moreover, the trial court was well within bounds when it determined that admission of the report and Tomlin's testimony from the Whiteman case would require an undue consumption of time and could result in confusion—a "mini-trial within a trial" as the trial court described it. (See *People v. Cooper*, *supra*, 53 Cal.3d at p. 817 [affirming the exclusion of evidence on the basis that the trial court could reasonably find that admitting the evidence would be "confusing and unduly time consuming"].)

Defendants take issue with the "undue consumption of time" conclusion, asserting that the materials from the Whiteman case could have been presented in "10 to 15 minutes," and that the total time involved "would no doubt have been less than one hour." Such assertion is belied by the record.

To begin with, the transcript of the cross-examination in the Whiteman case was, as noted, some 57 pages. Further, and as the Attorney General points out, the exposition in Romero-Arellano's brief of the facts in the Whiteman case consumes over four pages—more than the three pages setting out the "Facts" in the three-day trial resulting in the convictions here.

Further, any abuse of discretion in excluding the materials from the Whiteman case (and there was none) could not avail defendants, as it could not have been prejudicial. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331 [appellate court will reverse discretionary trial court ruling only on showing of " 'a clear case of abuse' [and] 'a miscarriage of justice' "].) Put another way, it is not reasonably probable the jury would have reached a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The evidence in the case was strong indeed, manifested perhaps best by the fact that the jury verdicts—guilty on all counts—were returned in less than two hours. And, it bears noting, the convictions were based primarily on the testimony of Gillette, not Tomlin. It was Gillette who initiated the traffic stop; Gillette who pursued the fleeing Saturn; and Gillette who observed the passenger throw the items from the Saturn. And after the Saturn had stopped and defendants were taken into custody, it was Gillette who

found the three packages containing over 40 grams of methamphetamine on the side of the road. Most of the crucial evidence was from Gillette.

It is true that Detective Cude found the scale and that Tomlin found the $910 in the Saturn. Also true is that Tomlin testified as an expert on the subject of possession for sale. However, the amount of money found in the car would hardly depend on Tomlin's "ability to perceive," the matter the motion intended to impeach. The same is true of Tomlin's expert testimony, which was not based on his ability to "perceive what's going on," but rather on his experience and training in the area of drug trafficking.

Finally, and as defendants acknowledge, Tomlin was impeached in connection with a few items of his testimony in this case. For example, Tomlin admitted that he was mistaken when he testified at the preliminary hearing that Gillette reported observing the passenger throw drugs and a scale out the window. He also mistakenly testified at the preliminary hearing that Gillette personally found the drugs, scale, and packaging material, when in fact he found only the three packages of methamphetamine. Such impeachment evidence would be more compelling than the ambiguous evidence from the Whiteman case.

## II. The Jury Instructions Properly Referred to the Prosecution as "The People"

### A. The Background and the Issue

Defendants' special instruction Number 1 requested that all CALCRIM instructions be modified and that the word "People" be changed to "prosecution," "government," or "state." The trial court refused. Defendants contend that this was error, violating their state and federal substantive and procedural due process rights.

Defendants' argument on this point is put forth by Jimenez-Gutierrez, in an opening brief with 27 pages of vigorous, and at times colorful, argument. That argument asserts four separate bases contending that referring to "the People" is wrong, two of which have multiple subparts. The brief also has an appendix containing excerpts from cases from four other states (Michigan, Illinois, Colorado, and New York) and from the New York Criminal Jury Instructions.

The Attorney General's response is set forth in far fewer pages, likewise vigorous, though less colorful. That response begins with this succinct statement: "This argument is meritless and has been rejected by our courts in *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1068 [(*Lewis and Oliver*)], *People v. Whisenhunt* [(2008) 44 Cal.4th 174], and *People v. Black* (2003) 114 Cal.App.4th 830 [(*Black*)]."

Defendants reply this way: "There is no discussion in *Black* of jury instructions or the manner in which the prosecutor should be identified in such instructions. Nor do the single sentence affirmations of *Black* in the laundry list of rejected claims at the ends of the death penalty case opinions issued by the Supreme Court purport to widen the scope of that analysis. None of those cases discussed anything beyond the blanket demand made by the defendant in *Black* that the prosecution be precluded from being identified as 'The People' or 'The People of the State of California' in any manner at any time in the trial." (Footnote omitted.)

Jimenez-Gutierrez's dismissive descriptions of *Lewis and Oliver* and *Whisenhunt* is risky, as the holdings of those cases would be binding on us. "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. . . . The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We hold that we are so bound, that the Supreme Court has "declared" that it is proper to use "the People" in jury instructions.

**B. <u>The Issue Has Been Decided by the Supreme Court</u>**

*Lewis and Oliver* held that "[t]o refer to the complaining party as 'The People' does not violate due process or other constitutional principles." (See *People v. Black[, supra,]* 114 Cal.App.4th 830, 832-834.)" (*Lewis and Oliver, supra,* 39 Cal.4th at p. 1068.) Criminal cases are brought in the name of "the people." (Pen. Code, § 684.) Trial courts refer to "the People." And, of course, jury instructions refer to "the People."

So, we conclude, the Supreme Court has determined the issue, as confirmed by the appellate record in *Whisenhunt*.

By notice of August 27, 2008 we advised the parties that we were considering taking judicial notice of Argument No. XXI in Whisenhunt's Opening Brief to the Supreme Court, and requesting the parties' positions on that subject. We have received and reviewed the response, and have concluded that judicial notice is appropriate, and so advised the parties by order dated October 29 2008.

Argument XXI in Whisenhunt's Opening Brief began as follows: "Throughout appellant's trial, the prosecution referred to himself as representing 'The People.' [Citations.] The trial court also repeatedly referred to the prosecution as 'the People' [citations] and to the case against appellant as 'the People' versus Michael McCrea Whisenhunt [citations]. All the exhibits introduced by the prosecution were called 'People's Exhibits.' The trial court also read the jurors instructions which referred to the prosecution as 'the People.' [Citing seven instructions] [¶] It is fundamentally unfair and a violation of the Due Process Clause of the state and federal constitutions to refer to the prosecution as 'The People,' . . . . [Citations.]"

Whisenhunt's argument was premised on *five different* references to "the People," the last of which was that the instructions referred to "the People," the argument defendants assert here.

Against that background, the unanimous Supreme Court opinion distilled Whisenhunt's argument, and its lack of merit, this way: "Defendant contends the prosecution's reference to itself as representing "the People" violated his right to due process and other constitutional rights. We have previously rejected such claims and do so here again. ([*Lewis and Oliver, supra,*] 39 Cal.4th 970, 1068; see also *People v. Black*[*, supra,*] 114 Cal.App.4th 830, 832-834.)" (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 223.)

It is, true, as defendants assert, that " 'an opinion is not authority for a proposition not therein considered.' " (*People v. Scheid* (1997) 16 Cal.4th 1, 17.) However, the case cited in *Schied* also states that "[l]anguage used in any opinion is . . . to be understood in

the light of the facts and the issue then before the court." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) (Also see *Stewart v. Stewart* (1926) 199 Cal. 318, 327 [subject "elaborately treated" in briefs of counsel]; *Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61 ["To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised."].)

In sum, we conclude that defendants' argument has been rejected by the law declared by the Supreme Court. But even if it were not, defendants would still not prevail, because referring to "the People" in the jury instructions is not error.

**C. <u>The Instructions Were Proper</u>**

The first Constitution for California was adopted on November 13, 1849, prior to statehood. (Deerings Ann. Cal. Const., Foreword, at p. v.) It was amended in 1862, following which article VI, section 18 provided that "The style of all process shall be: 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (*Id.*, App. 1, at p. 494.)

This language was deleted by the massive 1966 Constitutional revision, but it was simultaneously enacted without change as Government Code section 100, subdivision (b) (see Stats. 1966, 1st Ex. Sess., ch. 161, § 8, pp. 710, 713, 720), where it remains. And the same thought finds expression in Penal Code section 684, which was enacted in 1872: "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense."

Necessarily acknowledging all this, defendants concede that the provisions authorize a criminal case to be *brought* in the name of "the People." But apparently that is all. Defendants point to the language in Penal Code section 1096, which provides in pertinent part as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon *the state* the burden of proving him or her guilty beyond a reasonable doubt." (Italics added.) Focusing on the italicized "the state,"

defendants assert several arguments why use of "the People" in jury instructions is error. None of the arguments is persuasive.

Defendants begin by asserting that use of "the People" in jury instructions "is a recent amendment of historical terminology." In claimed support, defendants quote a 2005 comment from the CALCRIM task force as to how the term came to be included in the instructions.[4] Defendant's version of history is myopic.

As early as 1865, the Supreme Court dealt with an instruction (proferred by defendant, no less) referring to "the People." (*People v. Kelly* (1865) 28 Cal. 423, 427.)[5] In 1894 the Supreme Court stated that "[i]n the prosecution of criminal cases [the district attorney] acts by the authority and in the name of the people of the state." (*County of Modoc v. Spencer* (1894) 103 Cal. 498, 501.) Four years later that court rejected a claim of misconduct by the district attorney, holding that "[t]here is nothing in the point of the alleged misconduct of the district attorney in his closing address to the jury. By the language objected to he merely used well-known historical incidents to illustrate his argument. The court had told the jury, in response to certain other objections made by appellant's counsel while the district attorney was addressing them: 'If counsel for the people go beyond the evidence, or beyond a rational discussion of the evidence, it is your duty, gentlemen of the jury, to disregard it.' " (*People v. Barthleman* (1898) 120 Cal. 7, 15-16.)

---

[4] The comment is this: "In response to the first release in June 2000, the California District Attorneys Association expressed its disapproval of the term 'prosecutor' in the instructions. The subcommittee subsequently changed the term to 'the People." After the subcommittee implemented this change, members of the criminal defense bar disapproved. The subcommittee carefully considered their concerns, but noted that Penal Code section 684 expressly states that '[a] criminal action is prosecuted in the name of the people of the State of California . . . . the subcommittee therefore retained 'the People.' " (Report Summary to the Members of the Judicial Council from the Task Force on Criminal Jury Instructions dated August 26, 2005 at p. 12; http://www.courtinfo.ca.gov/jc/documents/reports/0805item4.pdf.)

[5] The instruction was held properly rejected because it was redundant.

The very first edition of CALJIC, published in 1946, referred to "the People" in various instructions. (See, e.g., Nos. 1, 3, 28, and 51B.)[6] Numerous instructions in the last edition of CALJIC referred to "the People," including, for example, CALJIC Nos. 1.00; 1.06; 2.11.5; 2.28; 2.61 (twice); 2.90; and 2.91. CALJIC 2.90 is particularly instructive. It is the instruction on reasonable doubt, and as such is based on Penal Code section 1096, the very statute on which defendants' argument is premised. And, as the Supreme Court has noted, "CALJIC No. 2.90 is constitutional as currently phrased. (*People v. Lewis* (2001) 25 Cal.4th 610, 651-652.)"[7] (*Lewis and Oliver, supra,* 39 Cal.4th at p. 1068.)

Defendants next argue that only four other states refer to criminal cases as being brought by "the People": Illinois, Colorado, Michigan, and New York. And, defendants go on, in all of those states the jury instructions refer to the "prosecuting party . . . [as] 'the state' or 'the prosecution' . . . or expressly advises the jury that 'the People' actually means 'the government.' " Defendants end this argument with heavy reliance on the New York procedure, which defendants describe as follows: "In New York, where the term 'The People' is specified as the title of the prosecuting entity, the standard instructions given at the end of the trial in New York refer to 'the prosecutor,' [citation] but most of the criminal instructions, which appear to [have] been crafted pursuant to a process similar to our own CALCRIM Task Force, refer to the prosecuting entity as the People. However, the introductory statement to the jury in New York includes the instruction that: [¶] The name of the case is the 'People of the State of New York against (*defendant's name[s]).*' The words, People of the State of New York, in that title mean the government of the State of New York. (CJI2d[NY] Title of Action)."

Satisfied with the New York approach, defendants must necessarily be satisfied with CALCRIM 100, an instruction that can be given "before or after voir dire."

[6] Other original CALJIC instructions referred to the state (No. 21) and the prosecution (No. 23).

[7] Admittedly, the constitutional attack on CALJIC 2.90 in *Lewis*, the case cited in *Lewis and Oliver*, was not based on the definition of "reasonable doubt." We do not know the basis of the constitutional attack in *Lewis and Oliver, supra,* 39 Cal.4th 970.

CALCRIM 100 begins as follows: "[Jury service is very important and I would like to welcome you and thank you for your service.] Before we begin, I am going to describe for you how the trial will be conducted, and explain what you and the lawyers and I will be doing. When I refer to 'the People,' I mean the attorney[s] from the (district attorney's office/city attorney's office/office of the attorney general) who (is/are) trying this case on behalf of the People of the State of California. When I refer to defense counsel, I mean the attorney[s] who (is/are) representing the defendant[s], [insert names of defendants]."[8] This instruction measures up to defendants' argument "that 'the People' means 'the government.' "

Moreover, and as defendants concede, the title of this case—designating the complaining party as "the People of the State of California"—appears to have been mentioned to the jury just once prior to the jury's verdict, at the reading of the information. It was immediately followed by the clarifying advisement that the defendants stood "accused *by the district attorney*." Moreover, at least one instruction referred to "the prosecution." In any event, defendants present no authority demonstrating the reason(s) why some states choose one term and some another, certainly nothing demonstrating that a particular term was chosen because of some due process right of defendants.

Defendants next assert, in arguments that run some 10 pages, that referring to "the People" tends to "bias the jury against the defendant for no valid reason." Elaborating, defendants assert that in a "purely logical world," the terms used would not matter. However, they go on, "juries are composed of humans, not Vulcans, and humans are not strictly logical." Thus, defendants state, in boldface: "It's not what you say, it's what people hear." This, it turns out, is the subtitle of a book by Frank Luntz entitled "Words

[8] The bench notes to this instruction say, "[t]here is no sua sponte duty to give an instruction outlining how the trial will proceed. This instruction has been provided for the convenience of the trial judge who may wish to explain the trial process to jurors. (See California Rules of Court, rule 2.1035.)" We are unable to tell from the record whether any such pretrial guidance was provided here, as the early voir dire proceedings were not reported.

that Work." Defendants rely heavily on Mr. Luntz, a "political scientist, pollster, and expert on testing language," from whose work defendants reach two claimed conclusions: (1) a label which creates " 'identification' between the listener and the speaker is the strongest form of rhetorical persuasion"; and (2) "repetition of the identification of the prosecutor as 'The People' reinforces the sense of 'identification' between the jury and the prosecution." Defendants' rhetoric is not persuasive. The case law is.

A recent case from the Fifth Appellate District, not cited by either party, bears directly on the issue. The case is *People v. Ibarra* (2007) 156 Cal.App.4th 1174, where defendant's penultimate argument, and its disposition, was described this way: "Fifth, Ibarra argues that the definition in CALCRIM No. 100 of 'the People' as 'the attorney from the district attorney's office who is trying this case on behalf of the People of the State of California' improperly favors the prosecution. With commendable candor, he acknowledges that *People v. Black*[, *supra*,] 114 Cal.App.4th 830 rejected that challenge. So do we." (*Ibarra*, 156 Cal.App.4th at pp. 1181-1182.) This, of course, is the issue defendants raise here.

Particularly persuasive, though not dealing with the identical issue, is *Black, supra,* 114 Cal.App.4th 830. The claim in *Black* was that defendant's state and federal constitutional rights were violated because the trial court "erred prejudicially by denying his pretrial motion to preclude the prosecution from being called 'The People' or 'The People of the State of California.' " (*Black*, at p. 832.) The Court of Appeal rejected the argument: "We conclude that this contention, although raised increasingly often, lacks merit. California statutes mandate that prosecutions be conducted in the name of 'The People of the State of California,' and defendant has failed to show that the applicable statutes are unconstitutional on their face or as applied here." (*Ibid.*)

Supporting such conclusion, the *Black* court said: "Defendant asserts that calling the prosecution 'The People' violates the federal and state constitutional guarantees of a fair trial by jury and due process of law. (U.S. Const. 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 15 & 16.) However, he fails to cite any authority so holding. He merely

notes that most other states style the prosecution, 'The State' or 'the Commonwealth' and that the federal district courts style the prosecution 'The United States,' then concludes: 'Such consensus indicates California's practice violates due process.' On the contrary, even if California's practice were unique, that fact would not tend to prove a constitutional violation. (See, e.g., *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1515-1516.)" *Black, supra,* 114 Cal.App.4th at p. 833. The factors cited in *Black* apply equally to defendants here, who likewise cite "no authority." Or anything else.

In rejecting defendant's argument in *Black*, Justice Sims observed that "[t]he signatories to this opinion have collectively served many decades on the trial and appellate benches and have participated in the adjudication of hundreds upon hundreds of criminal cases. [Citation.] We are not aware of a single instance in which the fact that a prosecution was brought in the name of 'The People' has had any influence whatsoever on the decision of a jury with respect to a defendant's guilt or innocence. There is simply no unfairness." (*Black, supra,* 114 Cal.App.4th at p. 833.)

Taking issue with this observation, defendants add this flourish: "The problem with that factual finding is that *there is absolutely no way that the justices who stated it can know if it is true or not*—regardless of how many cases they may have been involved in adjudicating at the trial or appellate level, and how great their powers of observation might be. And that is because every one of those cases involved a trial which *was* brought in the name of 'The People.' If there were instances where using different nomenclature would actually have made a difference there's no way they could possible know that. The justices of the *Black* court have no means of comparing one set of terminology with another, and no way of assessing—based on the experience they cite as the sole basis for their decision—whether the use of the challenged terminology harms the fact-finding mission of a criminal trial or not. The holding of *Black* is little more than a judicial version of the parental standby: 'Because I said so.' "

Defendants' criticism, however misplaced it is as against the court, can properly be leveled against them: their argument is essentially "because they say so"—nothing more than rank speculation. Specifically, defendants offer nothing to the contrary, no

evidence of any kind that referring to "the People" has any effect on jurors. Defendants cite to no empirical data; no study, sociological or otherwise; no commentary; no research; no law review articles; nothing supporting the claim that reference to "the People" in jury instructions has ever had any effect on a jury. Our independent research, scouring the library and all available reference works, produces the same yield: nothing.

Finally, looking at the instructions to the jury in their entirety, it is clear that defendants were not prejudiced. The trial court properly instructed the jury on the presumption of innocence and the prosecution's burden of proving defendants guilty beyond a reasonable doubt. The trial court instructed that both sides were entitled to a fair trial and had a right to expect a just verdict regardless of the consequences. We presume jurors are intelligent people capable of understanding the instructions given. (*People v. Mickey* (1991) 54 Cal.3d 612, 671.)

We conclude that there is no error in referring in the instructions to "the People." But even if there were, in light of the overwhelming evidence of defendants' guilt, it is not reasonably probable the jury would have reached a different outcome had the court referred to the prosecution some other way. (See *People v. Watson, supra,* 46 Cal.2d 818, 836.) Such error would be harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

We close with a final observation. The issue before us is straightforward: was it proper to refer in the jury instructions to "the People." We hold that it was. No argument was made that the prosecutor placed any emphasis on representation of "the People," no contention that there was undue focus on, or repetition about, "the People"—in short, no contention that, save for the reference in the instructions, "the People" was in any way misused. So, our holding is what it is, and we go on record as saying that the principle we confirm here today is not to be interpreted as a license for a zealous prosecutor to somehow use our opinion as justifying anything other than the use of appropriate conduct to see that justice is done. (See *Berger v. United States* (1935) 295 U.S. 78.)

## DISPOSITION

The judgments of conviction are affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.

| | |
|---|---|
| Trial Court: | Sonoma County Superior Court |
| Trial Judge: | Hon. Kenneth J. Gnoss |
| Attorney for Defendants and Appellants: | R. Stevens Condie, under appointment by the First District Appellate Project, for Defendant and Appellant Misael Jimenez-Gutierrez.<br>David M. Thompson, under appointment by the First District Appellate Project for Defendant and Appellant Heliodoro Romero-Arellano. |
| Attorneys for Plaintiff and Respondent: | Edmund G. Brown Jr. Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Martin S. Kaye, Supervising Deputy Attorney General, Christopher W. Grove, Deputy Attorney General. |